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Nos. 82-1913 and 82-1951

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOE G. GARCIA,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

On Appeal from the United States District Court for the Western District of Texas

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REPLY BRIEF OF APPELLANT JOE G. GARCIA

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REPLY BRIEF OF APPELLANT JOE G. GARCIA

ARGUMENT

I. THE TENTH AMENDMENT DOES NOT IMMUNIZE STATE-OWNED TRANSIT SYSTEMS FROM COMMERCE-CLAUSE REGULATION.

A. Appellees view *National League of Cities v. Usery*, 426 U.S. 833 (1976), as "conclusively decid[ing] that the power of the States to make wage and hour determinations is a function essential to their separate and inde-

pendent existence." San Antonio Metropolitan Transit Authority ("SAMTA") Br. at 15-16 n.10; *see* American Public Transit Association ("APTA") Br. at 13-14 n.14. And appellees contend that *Transportation Union v. Long Island R. Co.*, 455 U.S. 678 (1982) ("*UTU*"), creates the narrowest of exceptions, limited to "the context of what was perhaps a unique function for a state to acquire, *i.e.* railroads," APTA Br. at 28, and justified only by "the[] perhaps unique, comprehensive, uniform federal regulation of railroads," *id.* at 29 n.39; *see also* SAMTA Br. at 17-18, 21-22. Thus, in the most literal sense, appellees view *UTU* as a "restricted railroad ticket, good for this day and train only." *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

Appellees' argument is flawed in two respects. First, appellees overread *National League of Cities*. If that case had "conclusively decided that the power of the States to make wage and hour determinations is a function essential to their separate and independent existence," its rule would admit of no exceptions and would preclude application of the Fair Labor Standards Act or like legislation to *any* and *all* state employees. But *National League of Cities* does not so hold; the Court expressly couched its holding in more limited terms:

> We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8. [426 U.S. at 852]

Consistent with that holding, the Court in *UTU* determined that the operation of a railroad is not an "integral operation[] in [the] area[] of traditional governmental functions" and on that basis concluded that the federal government is empowered to regulate the wages and hours of state employees who operate state-owned railroads. *See* 455 U.S. at 684.

Second, in attempting to limit *UTU* to railroads, appellees focus on only one of the two discrete parts of the Court's analysis. The first part of that analysis—Part II of the opinion—does not rely on any consideration unique to railroads. Rather, the Court there reasoned that "'the running of a business enterprise is not an integral operation in the area of traditional government functions,'" *id.* at 685 n.11, *quoting Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 422-24 (1978) (Burger, C.J., concurring), especially where running such an enterprise "has traditionally been a function of private industry, not state or local governments," 455 U.S. at 686. The Court concluded that part of its opinion as follows:

> It is certainly true that some passenger railroads have come under state control in recent years, as have several freight lines, but that does not alter the historical reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments. *Federal regulation of state-owned railroads simply does not impair a state's ability to function as a state.* [*Id.*; second emphasis added]

Only after so concluding did the Court go on, in Part III of the *UTU* opinion, to discuss the railroad-specific factors appellees stress here such as that "[r]ailroads have been subject to comprehensive federal regulation for nearly a century," *id.* at 687, and that Congress "has determined that a uniform regulatory scheme is necessary to the operation of the national rail system," *id.* at 688. The Court drew in essence the same lesson in Part III that was drawn in the concluding passage of Part II just quoted:

> The State knew of and accepted the federal regulation; moreover, it operated under federal regulation for 13 years without claiming any impairment of its traditional sovereignty. . . . It can thus hardly be maintained that application of the Act to the

> State's operation of the Railroad is likely to impair the State's ability to fulfill its role in the Union or to endanger the "separate and independent existence" referred to in *National League of Cities v. Usery*, 426 U.S., at 851." [455 U.S. at 690]

Parts II and III of the *UTU* opinion, then, are independent of each other and establish two *alternative* grounds of decision. *Cf. Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

Part II announces the first rule of that case: where a State takes over the operation of a business enterprise that has traditionally been a part of the private sector, that enterprise does not become an "integral operation in the area of traditional government functions" immune from federal regulation of the wages and hours of the enterprise's employees. As the Court put it last Term in *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, —— U.S. ——, 103 S.Ct. 1011, 1014 n.6 (1983), "It is too late in the day to suggest that Congress cannot regulate States under its Commerce Clause power when they are engaged in proprietary activities."

Part III of *UTU* announces a second rule: where a State undertakes an activity that has long been subject "to comprehensive federal regulation" and as to which "a uniform regulatory scheme is necessary," the Tenth Amendment does not preclude federal regulation of the wages and hours of the state employees engaged in that activity regardless of whether the activity is deemed proprietary or non-proprietary.

It is the first of these rules that is controlling here as we demonstrated at length in our opening brief.[1]

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[1] Appellees' response to our argument that stated-owned transit operations are "business enterprises" is that such operations are not "profit-making." APTA Br. at 18; *see* SAMTA Br. at 27-28 n.24. But as we explained in our opening brief (at 15), the same was true of the railroad in *UTU*, which was deemed by the Court to be a "business enterprise." *See also Helvering v. Leland Powers*, 293

B. Underlying appellees' attempt to expand *National League of Cities* and to constrict *UTU* is the thesis that as the States take over private-sector business enterprises, their Tenth Amendment immunity from federal regulation should continually expand and Congress' commerce power continually contract. As we noted in our opening brief (at 23-24), that view of the Tenth Amendment would turn the Amendment into an economic incentive for the public sector to assume functions previously performed by the private sector. Under appellees' theory, so long as a service is provided through the private sector, that service is subject to federal regulation—regulation that in order to further other social values may (and, as the FLSA illustrates, often does) raise the costs of delivering that service; if, however, the States elect to provide that very service themselves, federal regulatory power ceases, permitting the States to offer the service at a lower cost.

We know of no evidence that the founding fathers sought in this way to further, or even to ease, the transformation of a private enterprise system for the provision of goods and services (like the transportation of the individual citizen on his private rounds from one place to another) to a state enterprise system. Certainly appellees offer no reasoned defense of their thesis that by reason of some natural law (akin to that currently held on the evolution of the universe) the Tenth Amendment is ever-

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U.S. 214 (1934) (concluding that the State's operation of a transit system was a "business enterprise" even though the system had lost sizeable sums of money and received state subsidies for many years); *United States v. California*, 297 U.S. 175, 183 (1936) (sustaining federal power to regulate a state-owned railroad and expressly rejecting the argument that "as the state is operating the railroad without profit, for the purpose of facilitating the commerce of the port, and is using the net proceedings of operation for harbor improvement, it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitutionally be subjected to the provisions of the federal Act").

expanding. Given the anomalies created by appellees' reading of the Tenth Amendment, their silence on the principle that justifies such a reading is pregnant with significance.

C. Appellees also place great stress on the importance of state-owned transit systems "to the life of any community," arguing that public transportation "is at least as important to the health and survival of a community as are the functions expressly protected in *National League of Cities*." APTA Br. at 16-17. But the commuter railroad at issue in *UTU* was no less important to New York than SAMTA is to San Antonio,[2] yet the Court concluded that the Long Island Rail Road is not an integral operation in an area of traditional governmental functions.

Indeed, were the rule otherwise, the Tenth Amendment would know no bounds. As this Court recognized in *Reeves Inc. v. Stake*, 447 U.S. 429 (1980), there is virtually no limit to the type of activities that "[a] State may deem . . . essential to its economy," *id.* at 442-43 n.16; even a state-run cement plant may "today be deemed indispensable," *id.* Thus, appellees's assertions of mass transit's importance do not justify clothing state-owned transit systems with the Tenth Amendment immunity that *National League of Cities* affords only to "integral operations in areas of traditional governmental functions."

D. Even if it would otherwise be appropriate to conclude that the States in entering a field previously occupied by private business enterprises acquire a Tenth-

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[2] As APTA stated in its *amicus curiae* brief in *UTU* (at 6):

> The primary and almost exclusive activity of the LIRR is provision of local public commuter transit service, a service that today is an activity typical of the services state and local governments have provided their citizens. *It is as essential and integral to the government's public responsibility in the community* it serves as are [the activities considered in *National League of Cities*]. [Emphasis added.]

Amendment immunity from federal regulation, that conclusion is altogether inappropriate with respect to mass transit because of the federal government's catalytic role in the States' entry into this field. Appellees attempt to dismiss the enactment and funding of the Urban Mass Transit Act in two ways, but those attempts do not have sufficient intellectual force to banish UMTA from this case.

Appellees first note that the federal government grants "substantial federal assistance" to the States to fund other activities as to which *National League of Cities* precludes federal regulation. SAMTA Br. at 43-44; APTA Br. at 39-40 n.61. But our point here has nothing to do with the mere fact of federal assistance to mass transit (although the percentage of such assistance is significantly higher for transit than for the other activities to which appellees point, *see* Secretary of Labor ("Sec'y") Br. at 34-35). Rather, what is critical is that when UMTA was enacted state-operated mass transit was rare and there was a recognized need for government *at some level* to enter the mass-transit field.[3]

The federal government could have responded to that need by itself acquiring and operating mass-transit systems; had this been done federal regulatory power would have been unlimited. (In the railroad industry the fed-

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[3] SAMTA attempts to minimize UMTA's effect by relying on the facts that circa 1965, over 50% of all transit riders patronized public transit and over 56% of transit employees worked for public transit systems. SAMTA Br. at 28. But those data are misleading, for most of the public transit riders and employees were accounted for by a few large cities such as New York; as of 1965 outside of the largest cities, state-owned transit operations were almost unheard of. *See* Hearings Before the Committee on Banking and Currency of the House of Representatives, 88th Cong., 1st Sess. at 313 (1963) (statement of George Anderson, Executive Vice President, American Transit Association); Lyle C. Fitch and Associates, *Urban Transportation and Public Policy* at 261 (1964). *See also* our opening brief at 15-16.

eral government in fact followed that course.[4]) Instead, Congress chose through UMTA to enter into cooperative endeavors with the States, recognizing the important federal interest in mass transit. *See* Sec'y Br. at 26-34. As a result, to quote again the Third Circuit's words in *Kramer v. New Castle Transit Authority*, 677 F.2d 308, 310 (3d Cir. 1982), *cert. denied*, —— U.S. ——:

——:

> The tradition that has evolved encompasses not only state involvement in local mass transportation but also an important federal role in the matter. The Authority cannot recast this development as one in which the states took over transit services on their own while the federal government only provided *post hoc* financial assistance. . . . There is . . . no tradition of the states qua states providing mass transportation.[5]

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[4] *See* Rail Passenger Service Act, 45 U.S.C. §§ 501 *et seq.*

[5] We hasten to add that contrary to the assertion of appellees, it is *not* necessary to our position to conclude that "state and local governments provide transit services because federal aid enticed them into doing so" (APTA Br. at 36-37) or even that federal aid "hastened the public takeover of transit systems" (SAMTA Br. at 41). We do not think it necessary or profitable to speculate about the States' real motive or true purpose in entering the transit field, or about what would have occurred in the absence of UMTA. It is enough that the States chose to enter the mass transit field hand-in-hand with the federal government in cooperative endeavors.

Because this is so, § 13(c) of UMTA, 49 U.S.C. § 1609(c), is significant, for as a result of that section the labor relations of public transit systems have been subject to some federal regulation since the States entered the transit field; indeed Congress enacted § 13(c) precisely because of the importance it attached to "protecting workers affected as a result of adjustments in an industry *carried out under the aegis of Federal law.*" S. Rep. 82, 88th Cong., 1st Sess. 12 (1963). *See also* our opening brief at 17-18.

SAMTA attempts to write off § 13(c) by ignoring that part of the section that requires grantees to "continu[e] collective bargaining rights." *See* SAMTA Br. at 41-42. APTA at least recognizes that requirement but suggests that requiring collective bargaining is "less instrusive" than "imposing specific federal conditions such as

Appellees argue alternatively that, in relying on UMTA, we are "really making a Spending Power argument in a Commerce Clause case." SAMTA Br. at 42-43. Appellees attribute to us "the onerous notion that by accepting federal funds to assume a function necessary to the life of the community, state and local governments . . . unleased boundless federal Commerce Clause authority over an integral activity otherwise entitled to Tenth Amendment protection." APTA Br. at 39.

This entire argument begs the critical question. The issue here is whether, in operating transit systems, the States are "entitled to Tenth Amendment protection" *in the first instance.* Appellees' Spending Clause argument assumes the answer to that question, and proves only that if an affirmative answer is assumed UMTA does not require the States to surrender that immunity. But our point is that because UMTA was enacted before the States were significantly involved in the mass transit field and because state entry has been accomplished through a joint program with the federal government subject to federal regulation, transit operations are not a traditional state function and the States never acquired a Tenth Amendment immunity with respect to those operations.

Thus, we are not suggesting "that Congress, by providing UMTA funds through the exercise of its Spending Power, has implicitly eliminated the Tenth Amendment

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the FLSA requirements." APTA Br. at 41. APTA's suggestion is startling—we had not thought any employer would view an obligation to bargain collectively with its employees to be "less intrusive" than a requirement to pay minimum wages. (The history of collective bargaining in mass transit may well explain why "the wages of transit operators have exceeded that of other full-time city employees." National League of Cities Br. at 7.)

In any event APTA's claim concerning the relative burdens of § 13(c) and the FLSA is irrelevant since § 13(c) at least establishes that there is no tradition of state immunity from federal regulation with respect to the employment conditions of public transit employees.

limitation on its Commerce Clause powers," APTA Br. at 43, nor are we arguing that "receipt of [UMTA] funds can[] abrogate the Tenth Amendment rights of [recipients]," SAMTA Br. at 41. Rather, our submission is that because of the federal-state partnership that has been the hallmark of public mass transit, the federal government never lost its Commerce Clause power to regulate the wages and hours of employees engaged in the business of delivering mass transit services.

E. A recurring theme in appellees' briefs is that our position cannot be squared with the guidance afforded by *National League of Cities* as to which state activities are "integral operations in areas of traditional governmental functions." In that case, the Court indicated that "such areas as fire prevention, police protection, sanitation, public health, and parks and recreation" meet that test because "[t]hese activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851. And appellees suggest that state operation of a mass transit system is more similar to "fire prevention, police protection, sanitation" and the like than to state operation of a commuter railroad.[6]

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[6] For present purposes, we indulge appellees' supposition that to the extent the *National League of Cities* "non-exhaustive" list of traditional and integral state functions clashes with the principles refined from the *National League of Cities* opinion in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) and *UTU*, the former rather than the latter prevail. We do so because, as we show in the text, even that unreasoned approach to the reading of this Court's cases and the proper means of perfecting constitutional law does not lead to the result appellees seek. But our response would be incomplete if we did not reemphasize the point made in our opening brief (at pp. 22-25) that the values embodied in the Tenth Amendment are implicated to only a limited degree by federal regulation of the States as service-providers (as distinguished from the States as lawmakers and law enforcers). That being so, it is our position that the *National League of Cities*' list not only fails to provide a sound foundation for resolving the instant case but should also, on an appropriate occasion, be reexamined.

From a functional standpoint it is obvious that mass transit systems provide a service that is quite different from those listed in *National League of Cities* and is virtually identical to the commuter railroad at issue in *UTU*. Indeed the only functional difference between mass transit and commuter railroads is the type of vehicle used to perform the service. In this regard, we agree with what APTA told this Court in its *amicus curiae* brief in *UTU* (at 6): "[T]he service performed is what is of constitutional significance, not the means selected by the state to perform that service."

Moreover, even if the functional similarities between mass transit and commuter railroads could somehow be set aside in determining whether there is federal regulatory power, mass transit still would be distinguishable from the services listed in *National League of Cities*. First, all of the services listed in *National League of Cities* are services the States have "traditionally afforded their citizens," as the Court twice noted. 426 U.S. at 851, 855. In contrast, state-owned mass transit systems are a recent phenomenon.[7] Second, unlike mass transit, the States had provided the services listed in *National League of Cities* long before the dawn of federal assistance and the States had, therefore, long acted free from federal regulation. While appellees attempt to find exceptions to this general rule, their efforts are unavailing and, giving appellees the benefit of every doubt, their few meager examples do not detract from the validity of the generalization.[8] Third, again in contrast to

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[7] Appellees' reliance on the history of state regulation of transit operations, *see* SAMTA Br. at 24-26, and of state responsibility for road construction, SAMTA Br. at 27; APTA Br. at 23, is misplaced. While transit systems, like a number of other private enterprises, have been regulated as "public utilities," and road building has been a public responsibility, transit systems were historically operated as *private business enterprises*. The Secretary of Labor develops this point in his opening brief (at 20-24) and appellees have made no reasoned response.

[8] For example, SAMTA asserts (Br. at 44) that "An activity specifically exempted in *National League*, which was essentially

mass transit, the services listed in *National League of Cities* are provided by the States to all citizens regardless of their ability to pay; thus there is, in the main, no charge for public schooling, fire prevention, police protection, or sanitation.[9] Fourth, and finally, the States

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created as a result of federal funding, is solid waste management (sanitation)." But "solid waste management" is simply a new form of an old activity—waste disposal—which has been a function of government as a result of the fact that waste collection is largely a governmental function; in earlier years, governments owned dumps, incinerators and the like for waste disposal. *See* E. Savas, *The Organization and Efficiency of Solid Waste Collection*, at 18-22, 35 (1977); American Public Works Association, *History of Public Works in the United States, 1776-1976*, at 433-39, 441, 447-48 (1976).

SAMTA also implies that the Hill-Burton Act played the same role in the development of public hospitals that UMTA did in the development of public transit. But long before Hill-Burton was passed there was a well-established tradition of publicly operated hospitals; indeed the oldest hospital in the United States is Philadelphia General Hospital which was opened in 1732, and by 1900 it was commonplace for a State, county, or city to operate a hospital. J. Hamilton, *Patterns of Hospitals Ownership and Control*, 68-69, 75-76, 79 (1961). And while it is true, as SAMTA notes, that Hill-Burton facilitated the growth of county hospitals, the very source that SAMTA relies on to establish that fact also establishes that Hill-Burton did not have that effect with respect to state or city hospitals. J. Hamilton, *supra*, at 69, 83.

[9] Appellees correctly note that some of the state services discussed in *National League of Cities* generate some revenue through charges. SAMTA Br. at 40; APTA Br. at 19-20. But that does not detract from the reality that the services in question are provided by the States to all citizens regardless of their ability to pay. For example, "every . . . state provides its citizens with free elementary and secondary schooling," *Mueller v. Allen*, —— U.S. ——, 103 S.Ct. 3062, 3064 (1983); the education charges to which APTA refers are for specialized services such as summer school or driver education, *see id.* at 3065 n.2. Similarly, the public park charges on which SAMTA relies are also for specialized services such as use of campgrounds, *see* U.S. Dept. of the Interior, *Fees and Charges Handbook* at 9, 29 (1982); indeed, the very reason that governments have created and maintained parks is to provide "for the 'leisure of the people,'" and not just the affluent. *See* American Public Works Association, *supra*, n.8 at 555. And while public universities and public hos-

in providing the services listed in *National League of Cities* generally do not compete with profit-making businesses; in contrast, mass transit competes directly with forms of private transportation..

II. CONGRESS WAS NOT REQUIRED TO AMEND THE FLSA AFTER *NATIONAL LEAGUE OF CITIES* TO PRESERVE THAT ACT'S COVERAGE OF STATE-OWNED TRANSIT SYSTEMS.

Appellees argue that because *National League of Cities* held that the FLSA may not constitutionally be applied to some categories of public employees, a "subsequent amendment" is required before the FLSA may be applied to any group of public employees. Appellees advance two arguments in support of this proposition; neither can withstand analysis.

A. Appellees first suggest that "it is not probable that Congress would have intended to enact a law only directed at a small class of public employees if it could no longer carry out its intent to cover all state and local employees." APTA Br. at 46; *see* SAMTA Br. at 49. What this Court said last Term in response to a similar argument in *INS v. Chadha*, —— U.S. ——, 103 S. Ct. 2764, 2774 (1983), is equally applicable here: "we need not embark on that elusive inquiry since Congress itself has provided the answer to the question of severability. . . ." Section 219 of the FLSA expressly states that "If . . . the application of [any] provision to any person or circumstance is held invalid . . . the application of such provision to other persons or circumstances shall not be affected thereby." 29 U.S.C. § 219. This section thus refutes appellees' understanding of Congress' intent.[10]

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pitals generally charge user fees for their basic services, those charges are waived for those who cannot afford to pay. *See* Comm'n. on Financing of Hospital Care, *Factors Affecting the Costs of Hospital Care* at 6-8 (1954); Carnegie Foundation for the Advancement of Teaching, *The States and Higher Education*, 30, 46 (1976).

[10] It is noteworthy that on appellees' theory, *National League of Cities* should have culminated in a decree declaring the 1974 amendments to the FLSA invalid *in toto* and precluding their

Even apart from the severability clause, appellees' argument makes no sense. Appellees offer no reason to believe that Congress would view the application of the FLSA in the public sector to be an all or nothing proposition and would not wish to cover any public employee if every such employee could not be covered. In the private sector, the reverse always has been true: Congress has deliberately applied the FLSA to some categories of employees but not others.

There is, moreover, a specific indication that Congress would choose to apply the FLSA to state transit employees even though that Act cannot be applied to other specific categories of state employees. As previously noted, in enacting UMTA in 1964 Congress took special care to afford certain protections to transit workers. *See* pp. 7-8 n.5, *supra*. Moreover, the FLSA was amended to cover public transit employees in 1966, *see* P.L. 89-601, 80 Stat. 931, eight years *before* Congress amended the Act to apply to all public employees. The 1966 Congress so acted because public transit systems "are engaged in activities which are in substantial competition with similar activities carried on by enterprises organized for a business purpose" and because Congress therefore concluded that "[f]ailure to cover . . . these enterprises will result in the failure to implement one of the basic purposes of the Act, the elimination of conditions which 'constitute an unfair method of competition in commerce.'" H.R. Rep. 1366, 89th Cong. 2d Sess. 16-17

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application to any category of public employees. That is not, in fact, what occurred: this Court did not mandate such a decree, and on remand the district court entered an order approving an amendment to the Secretary's FLSA regulations which expressly contemplated that the FLSA would continue to be applied to public employees performing "non-traditional" functions. *See National League of Cities v. Marshall*, 429 F. Supp. 703 (D.D.C. 1977); 42 Fed. Reg. 32253 (June 24, 1977). The Secretary subsequently further amended that regulation to specify certain functions, including mass transit, as being "non-traditional," 29 CFR § 775.3(b) (1983), and it is the validity of that second amendment, insofar as it applies to public transit, that is at issue here.

(1966); S. Rep. 1487, 89th Cong. 2d Sess. 8 (1966). And the fact that, as a result of *National League of Cities*, the FLSA cannot be applied to all public employees in no way detracts from Congress' desire to assure that at least in the transit industry all workers—whether publicly or privately employed—are covered by the Act. Thus even apart from the severability clause previously quoted, there is every reason to believe that Congress would desire the FLSA to cover public transit employees even if the Act could not cover any other category of public employee.

B. Appellee SAMTA—although, significantly, *not* appellee APTA—advances a second argument: SAMTA contends that even if application of the FLSA to transit employees would best accord with congressional intent, such application is nonetheless precluded because that would require "add[ing] words of limitation (codifying the Court's 'traditional government function' holding) where none presently exist." SAMTA Br. at 47. According to SAMTA, courts are required to frustrate Congress' intent if furthering that intent would require "a court to add words to a statute." *Id.* SAMTA's argument is doubly flawed.

(1) Even if the rule of severability were as SAMTA contends—and it is not—SAMTA would not be helped. For if the 1974 amendments to the FLSA which extended the coverage of that Act to all public employees were deemed invalid *in toto*, the situation would then revert to that which existed prior to 1974.[11] At that time the FLSA applied to public transit operations by virtue of discrete provisions of that Act.[12] Specifically, under the 1961 and

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[11] *Cf. Frost v. Corporation Comm'n*, 278 U.S. 515, 525-27 & cases cited (1929).

[12] The statement in text requires one qualification. Under the 1966 Act, transit operators were not covered by the overtime provisions of the FLSA. P.L. 89-601, § 206. A discrete provision in the 1974 amendments phased out that special exemption. P.L. 93-

1966 amendments to the FLSA, the term "employer" was defined to include the State with respect to certain specified categories of employees, including transit employees, P.L. 89-601, § 102(b); the term "enterprise engaged in commerce" was defined to include a local transit enterprise with gross sales no less than $1,000,000, P.L. 87-30, § 2(c); and the term "activities performed for a business purpose" was defined to include activities in connection with a transit operation if "the rates and services of such [transit operation] are subject to regulation by a State or local agency," P.L. 89-601 § 102(a)(2). Thus, contrary to SAMTA's argument, even if *National League of Cities* precluded all application of the provisions at issue in that case, it still would not be necessary to add even a single comma to the FLSA in order for that Act to cover state transit employees.[13]

259, § 21(b)(1)(3), 88 Stat. 68. That provision was not involved in and is not affected by *National League of Cities*.

[13] In an attempt to avoid this conclusion, SAMTA contends that the 1966 amendments, which defined "activities performed for a business purpose" to include transit operations if "the rates and services of such [operations] are subject to regulation by a State or local agency," meant that "only public systems that are regulated by some other state or local agency are covered" and not those transit systems "that regulated their own rates and service." SAMTA Br. at 49 n.41. On this basis it is contended that SAMTA was not covered by the 1966 amendments and would not be covered if the 1974 amendments were deemed invalid *in toto*.

The legislative history of the 1966 amendments refutes SAMTA's argument. That history shows that Congress' intent was to eliminate the "distinction between a public or private local transit system," S. Rep. 1487, *supra*, at 26-27, because "[f]ailure to cover *all* activities of these enterprises will result in the failure to implement one of the basic purposes of the act, the elimination of conditions which 'constitute an unfair method of competition in commerce,'" *see* p. 14, *supra*.

SAMTA bases its argument on written testimony by Carmack Cochran on behalf of the American Transit Association in 1971 with respect to a bill which would have extended the FLSA to all state employees (as the 1974 amendments eventually did). All that

(2) In any event, SAMTA is wrong in contending that the courts are precluded from reading words of limitation into a statute which is unconstitutional by virtue of its breadth and which Congress would want to apply more narrowly. In any severability case "[t]he question is one of interpretation and of legislative intent." *William v. Standard Oil Co.*, 278 U.S. 235, 241 (1929). "'[I]t is not an adequate discharge of [that] duty for the courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.'" *U.S. v. Hutcheson*, 312 U.S. 219, 325 (1941), *quoting Johnson v. United States*, 163 F. 30, 32 (Holmes, J.). This is true in a severability case even when "the necessary remedial operation . . . is more analogous to a graft than amputation," *Welsh v. United States*, 398 U.S. 333, 364 (1970) (Harlan, J. concurring). *See also Heckler v. Mathews*, —— U.S. ——, 52 L.W. 4333, 4336 & n.1 (March 5, 1984).

This Court has not hesitated in other cases to engraft words onto a law it has found to be unconstitutional in order to cure the constitutional defect in the manner most consistent with Congress' intent. *E.g., Califano v. Westcott*, 443 U.S. 76 (1979). And because application of the FLSA to public transit employees would best further Congress' will, such application would be proper even if it

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Cochran said in his testimony is that the proposed FLSA amendment "would apply to public transit systems whether or not their rates and services are subject to regulation by a state or local agency," *Hearngs on H.R. 7130 Before the General Subcommittee on Labor of the House of Representatives Committee on Education and Labor*, 92nd Cong., 1st Sess. 206 (1971). Cochran did not suggest, as SAMTA now does, that absent the amendment the FLSA applied only to public transit systems that were externally regulated. And when the House Committee reported the proposed amendments, that Committee stated that "public employees employed in . . . local transit operations" were already covered by the FLSA by virtue of "the 1966 amendments". H.R. Rep. 92-672, 92nd Cong., 1st Sess. 6 (1971).

required the Court to read words of limitation into the 1974 amendments to the FLSA.[14]

CONCLUSION

For the above stated reasons the decision below should be reversed.

Respectfully submitted,

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[14] *United States v. Reese*, 92 U.S. 214 (1876), on which SAMTA relies, is not to the contrary. Although there is language in *Reese* which could be read to adopt a formalistic rule precluding engrafting words onto a law under any circumstance, this Court subsequently has understood *Reese* to rest on a determination as to the congressional intent underlying the particular statute at issue in that case and thus to be "but an exercise of judicial interpretation." *Waters-Pierce Oil Co. v. Texas*, 177 U.S. 28, 42 (1900). Furthermore, *Reese* involved a penal statute and the Court was concerned about the vagueness problem that could result if words of limitation were engrafted onto the law:

> It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. [92 U.S. at 221]

See also Baldwin v. Franks, 120 U.S. 678, 688 (1887).

Hill v. Wallace, 259 U.S. 44 (1922), on which SAMTA also relies, is likewise distinguishable. The Court's reasoning in *Hill* consists entirely of quotations from *Reese*, words which, as just noted, the Court has understood to be "an exercise of judicial interpretation." And the nonseverability holding of *Hill* undeniably follows Congress' intent with respect to the law at issue there.